INTERIOR BOARD OF INDIAN APPEALS

Cliff Walking Elk v. Acting Great Plains Regional Director, Bureau of Indian Affairs

40 IBIA 264 (03/07/2005)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

CLIFF WALKING ELK, Appellant, v. ACTING GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	: : : : : : : : :	Order Affirming Decision in Part, Vacating Decision in Part, and Returning Matter to the Regional Director Docket No. IBIA 03-70-A March 7, 2005

This is an appeal from a January 17, 2003, decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), affirming the assessment of trespass damages against Cliff Walking Elk (Appellant) and John Schmid for livestock trespass and destruction of hay on the Standing Rock Reservation. For the reasons discussed below, the Board affirms the Regional Director's decision in part, vacates it in part, and returns the matter to the Regional Director for further action as described below.

Background

Appellant is a member of the Standing Rock Sioux Tribe (Tribe). During all times relevant to this appeal, he held a grazing permit for Standing Rock Range Unit 720, where he grazed cattle with a brand registered jointly to him and Schmid. Another tribal member, David Harrison, was lessee under a lease of tribal trust tracts T-5141 and T-5855 and was also authorized by Tribal Resolution 260-01 to use 1,263.4 acres of government land controlled by the Tribe under section 10 of the Act of Sept. 2, 1958, Pub. L. No. 85-915, 72 Stat. 1762. 1/

1/ This statute authorized the taking of land on the Standing Rock Reservation for the Oahe Dam and Reservoir. Section 10 provides in relevant part:

"After the Oahe Dam gates are closed and the waters of the Missouri River impounded, the [Tribe] and the members thereof shall be given exclusive permission, without cost, to graze stock on the land between the water level of the reservoir and the exterior boundary of the taking area."

In 1983, the Tribe enacted Resolution 104-83, governing grazing privileges on the Oahe Taken Area.

On August 24, 2002, a Saturday, Harrison called the Land Operations Officer, Standing Rock Agency, BIA, at his home, stating that Appellant's cattle 2/ were in Harrison's hay and had damaged or destroyed several bales. The Land Operations Officer joined Harrison and together they counted 57 of Appellant's cattle in trespass. They removed the cattle from the hay field to prevent further damage and returned them to Appellant's range unit.

On August 26, 2002, the Land Operations Officer obtained current hay prices from an economist with the South Dakota State University Cooperative Extension Service. On the same day, the Acting Superintendent, Standing Rock Agency (Superintendent) sent Appellant and Schmid a notice of trespass and an assessment of damages, penalties and costs in the total amount of $1,605.61. 3/ The Superintendent's letter included an incorrect description of the land where the cattle were found and did not include appeal information. Appellant wrote to the Superintendent on September 11, 2002, noting the incorrect land description and raising other objections to the Superintendent's August 26, 2002, letter. In his response dated September 23, 2002, the Superintendent corrected the land description, addressed some of Appellant's other objections, and provided appeal instructions. He did not make any changes in the assessment against Appellant and Schmid.

Appellant appealed to the Regional Director, who affirmed the Superintendent's decision on January 17, 2003. Appellant then appealed to the Board. He made arguments in his notice of appeal but did not file an opening brief or a reply brief. The Regional Director filed an answer brief.

Discussion and Conclusions

Appellant makes twelve arguments. In his first argument, he contends that his right to due process was violated when the Superintendent failed to include appeal information in his August 26, 2002, letter.

The Superintendent omitted appeal instructions from his August 26, 2002, letter, possibly because he considered the letter to be only a trespass notice and so relied upon 25 C.F.R. § 166.803(c), which provides: "Trespass notices under this subpart are not subject to appeal under 25 C.F.R. part 2." However, because the August 26, 2002, letter also included an assessment for damages, penalties and costs, it should have included appeal information.

2/ The record does not show the respective ownership interests of Appellant and Schmid in the cattle. For ease of reference, the cattle are referred to herein as Appellant's cattle.

3/ Of this total, $1,310 was for damage to Harrison's hay and $189.59 was for costs. See page 268 below for a discussion of the remaining $106.02.

The Superintendent recognized his error and included appeal information in his September 23, 2002, letter. Thus Appellant was informed of his right to appeal. As is evident, he has exercised that right. He fails to show how the one-month delay in providing appeal information violated his right to due process.

Appellant's second argument states in its entirety: "The new Regulation should not be used until the new contract period. November 1, 2003. Does the local agency have the authority to break contract without mutually agreeing, of all parties, Tribes." Notice of Appeal at 1.

Although this argument is not very clear, it appears possible that Appellant intends to argue that the present version of 25 C.F.R. Part 166, which went into effect on March 23, 2001, should not be applied to him until certain contracts, possibly his grazing permit and/or Harrison's lease, had expired.

Appellant made a somewhat similar argument before the Regional Director. As the Regional Director explained, trespass is not an activity authorized by a grazing permit or other contract. Rather it is, by definition, an unauthorized activity. See 25 C.F.R. § 166.800: "[T]respass is any unauthorized occupancy, use of, or action on Indian agricultural lands." BIA properly applied the trespass regulations in effect at the time of the trespass and did not, in doing so, violate Appellant's grazing permit or any other contract.

Appellant's third argument states in its entirety: "[BIA] recognized the Tribal Land Management office and the sovereign status to manage its affairs." Notice of Appeal at 1.

While BIA undoubtedly recognizes the Tribe's sovereignty, the relevance of this fact to Appellant's case is not clear. Appellant fails to show that BIA's recognition of the Tribe's sovereignty relates to any error in the Regional Director's decision.

In his fourth argument, Appellant objects to BIA's having sent the certified copy of the August 26, 2002, trespass notice to the address shown in the State brand book. He states that he believes the Agency's Land Operations Officer was trying to discredit his competency to his lender. Appellant does not explain how BIA's use of the address in the brand book had the effect he describes.

25 C.F.R. § 166.803(a)(3) requires that a trespass notice include "[a] verification of ownership of unauthorized property (*e.g.*, brands in the State Brand Book for cases of livestock trespass, if applicable)." In this case, the State brand book identified Appellant and Schmid as the owners of the cattle in trespass and provided an address, which was evidently Schmid's address. As co-owner of the trespassing cattle, Schmid clearly had a right to be notified of the

trespass. Further, BIA had a responsibility to notify him. See 25 C.F.R. § 166.803(a). BIA properly mailed the notice to the address shown in the brand book. 4/

In his fifth argument, Appellant complains that the Superintendent's August 26, 2002, letter included an incorrect description of the land where the cattle were found. He argues that the error was a violation of 25 C.F.R. § 166.803(a)(2), which requires that a trespass notice include "[a] legal description of where the trespass occurred." As noted above, the Superintendent conceded the error and corrected the land description in his September 23, 2002, letter. The fact that Appellant pointed out the error to the Superintendent suggests that he was aware of where the trespassing cattle were located. In any event, he fails to show how he was harmed by the incorrect description in the first letter.

In his sixth argument, Appellant complains that he has not been granted the right to use any of the Oahe Taken Area, although the Land Operations Officer has promised that he would be granted such a right. These rights are granted by the Tribe, not by BIA. Appellant should therefore take his complaint to the Tribe. The complaint has no bearing on the present appeal.

In his seventh argument, 5/ Appellant contends that, because Pub. L. No. 85-915 authorizes the Tribe and its members to use the Taken Area without cost, Appellant should not have to pay compensation for his trespass.

This argument assumes that the trespass damages were assessed for trespass to the Taken Area only. The trespass notice, as corrected, stated that the trespass occurred within the SE 1/4 of sec. 35, T. 23 N., R. 29 E., but did not state whether the land was within Harrison's lease or within the portion of the Taken Area allocated to Harrison. Harrison's lease included crop land in the SE 1/4 of sec. 35, T. 23 N., R. 29 E. The portion of the Taken Area allocated to Harrison includes 177.9 acres within sec. 35, T. 23 N., R. 29 E. Although Tribal Resolution 260-01 does not show how much of that acreage is located within the SE 1/4 of sec. 35, it is possible that some of it is within the SE 1/4.

In his decision, the Regional Director appears to have assumed that some of the damage to Harrison's property occurred in the Taken Area. However, in his brief before the Board, he states that the leased land "contained the hay field and bales of hay where the property damage occurred" and that, "[w]hile the damage to property was exclusively on the Tribe's trust property leased to Harrison, the BIA employee noted that the trespass was over the Tribe's trust property and Taken Area allocated to Harrison." Regional Director's Brief at 5.

4/ BIA sent an uncertified copy of the notice to Appellant at his local address. It sent certified copies of the Superintendent's Sept. 23, 2002, letter to both Appellant and Schmid.

5/ Appellant does not number this argument. However, it comes between arguments six and eight in his notice of appeal.

Appellant had an opportunity to file a reply brief, in which he could have disputed the statement made in the Regional Director's brief that all the property damage occurred on the leased land. Appellant did not file a reply brief and so has not disputed the Regional Director's statement. Given that Harrison's lease was primarily for crop land and that, under Tribal Resolution 104-83, only grazing is authorized on the Taken Area, the Board sees no reason to doubt the Regional Director's statement that Harrison's hay field and bales of hay were located entirely within his lease. Appellant has not shown that any of the damage to Harrison's property occurred in the Taken Area and thus he has not shown that BIA erred in assessing him for damage to Harrison's property.

The Bill for Collection sent to Appellant included an amount of $106.02 to be paid to the Tribe. Although the bill does not state what that amount is for, the Superintendent's August 26, 2002, letter indicates that it relates to BIA's calculation titled "Cost of products illegally used." This calculation was undoubtedly made under 25 C.F.R. § 166.812(a), which requires that trespassers pay the "value of the products illegally used or removed plus a penalty of double their values."

BIA's calculation is based on an amount per Animal Unit Month and thus appears to represent compensation for forage consumed. To the extent Appellant's cattle may have been trespassing on the Taken Area, BIA was not authorized to collect damages for forage consumed under 25 C.F.R. § 166.812, because that section applies only to Indian agricultural land, and the Taken Area does not fall within the definition of "Indian agricultural land." 6/

Accordingly, BIA's assessment of $106.02 will be vacated. The Regional Director may recalculate an amount of compensation for "products illegally used or removed" provided a determination can be made as to the value of the products used or removed from the leased land. 7/

In his eighth argument, Appellant alleges that BIA is inconsistent in its enforcement of the trespass regulations and failed to take action in another trespass which occurred on Range Unit 359. Appellant evidently believes that the trespass regulations should not be enforced against him if they were not enforced against someone else. Appellant supplies no details of

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6/ For purposes of 25 C.F.R. Part 166, "Indian agricultural land" is defined as "Indian land, including farmland and rangeland, excluding Indian forest land, that is used for production of agricultural products, and Indian lands occupied by industries that support the agricultural community, regardless of whether a formal inspection and land classification has been conducted." "Indian land" is defined as "any tract in which any interest in the surface estate is owned by a tribe or individual Indian in trust or restricted status." 25 C.F.R. § 166.4.

7/ The Regional Director should also determine whether any of this compensation should be paid to Harrison as lessee. See 25 C.F.R. § 166.818(b)(2).

the other alleged trespass. 8/ However, even if BIA erred in failing to act against another trespasser, it would not help Appellant's case. No one has a right to relief from enforcement of the trespass regulations simply because BIA did not act against another trespasser, even if BIA erred in failing to act in the other case. Cf. DuBray v. Acting Aberdeen Area Director, 30 IBIA 64, 67 (1996) (a person has no right to have the law violated on his behalf merely because the law has been, or may have been, violated in other, similar circumstances).

In his ninth argument, Appellant alleges that Harrison's cattle were in the trespass area for about a week and were responsible for part of the trespass damage. Appellant does not furnish any evidence to support this allegation. Nor does he provide any details of the alleged occurrence. For instance, he fails to state when Harrison's cattle were in the area or how many cattle were involved. Appellant's bare allegation is insufficient to overcome the recorded observations of the Land Operations Officer as to the identity of the cattle found in the hay field and the damage done by those cattle.

In his tenth argument, Appellant objects to BIA's having sought a valuation of the hay from a South Dakota State University Cooperative Extension Service economist, rather than from the Sioux County Extension Service or the Agency's Land Operations Officer. He also argues that the price of hay on the Standing Rock Reservation should have been lower than elsewhere because the reservation was in a drought area. Further, he contends that the hay destroyed by his cattle was of low quality.

Appellant does not show that the State University Extension Service economist failed to provide hay prices relevant to the Standing Rock Reservation. While he contends that "Indian Ranchers purchased 1200 lb. prairie bales in the range of $20 - $30 per bale," Notice of Appeal at 3, he fails to state when these bales were purchased or provide any other information about the purchase(s) that would permit a meaningful comparison to be made. He also fails to provide any support for his contention that the drought caused a decrease in hay prices on the reservation 9/ or his contention that the hay destroyed by his cattle was of low quality. Appellant's contentions are insufficient to show that BIA's valuation of the destroyed hay was erroneous.

In his eleventh argument, Appellant complains about an October 9, 2002, compliance check in which, he suggests, his cattle were again found in trespass. This appeal does not concern the October 9, 2002, compliance check or any BIA action resulting from that compliance check. Accordingly, this argument is not relevant here.

8/ An Oct. 31, 2002, memorandum from the Land Operations Officer to the Regional Office describes an incident on Range Unit 359, which may be the one to which Appellant refers. However, this cannot be determined from the bare assertion made by Appellant.

9/ In fact, a drought might be expected to cause an increase in the price of hay.

Appellant's twelfth and last argument states in its entirety: "My letter dated October 22, 2002 explained the circumstances on the trespass I have witnesses to attest to the statements I made. I also enclosed a letter regarding the fires we had in the Kenel District."

Appellant's appeal to the Regional Director is dated October 22, 2002, and is presumably the letter to which he refers. With respect to the day of the trespass, he stated in that letter that he was "down in the area working" from about 8:00 am to 9:00 pm and saw Harrison but not the Land Operations Officer. Oct. 22, 2002, Appeal to the Regional Director at 3. Presumably, Appellant means to argue that the Land Operations Officer was not actually present at the trespass site on August 24, 2002. While he states that he has witnesses, he fails to offer any statements from those witnesses. Appellant's vague and unsupported statement is not sufficient to overcome the Land Operations Officer's report of the incident.

Appellant submits an October 23, 2000, letter in which he complained about a fire that occurred on September 19, 2000. However, he fails to explain the relevance of the fire to the issue in this appeal.

With one possible exception, i.e., the $106.02 apparently assessed for the "cost of products illegally used," Appellant has failed to show error in the Regional Director's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's January 17, 2003, decision is affirmed except with respect to the $106.02 apparently assessed for the "cost of products illegally used." With respect to that assessment, the decision is vacated, and the matter is returned to the Regional Director for further action as described above. 10/

// original signed	// original signed
Anita Vogt	Steven K. Linscheid
Senior Administrative Judge	Chief Administrative Judge

10/ David Harrison was not identified as an interested party by Appellant or the Regional Director and so has not been served with any filings or Board orders in this matter.

He is being furnished with a copy of this decision and should be permitted to participate in any further proceedings before the Regional Director.